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BOOK REVIEW

SPECIAL INTERESTS, PRINCIPLES, AND SENTENCING REFORM IN AMERICA

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GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., Cato Inst. 2004) 160 PP.

Go Directly to Jail[1] is all about sentencing reform. Editor Gene Healy and his writers dedicated themselves to the task of making a strong case against "overcriminalization," which, according to the flyleaf, has produced an America in which it is "frighteningly easy . . . to be hauled off to jail."

Compared to just thirty-five years ago, it *is* relatively easy for an American to end up in jail or prison. In 1970, there were fewer than 200,000 people in state and federal prisons, a number that had remained remarkably stable during the preceding seven decades of the twentieth century.[2] From the beginning of World War II through 1972, the combined state and federal incarceration rates for sentenced prisoners remained close to or below 100 per 100,000 people.[3] But in 1973, the nation's inmate population began to increase.[4] It has grown every year since.[5] By June 2005, the number of state and federal prisoners had increased more than six-fold to an estimated 1,512,823.[6] An additional 747,529 inmates in local

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[1] GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

[2] THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 32 (Steven R. Donziger ed., 1996).

[3] *Id.* Rates are expressed per 100,000 adults 18 years and older. Prior to the 1970s, American incarceration rates were comparable to contemporary rates in European nations.

[4] *Id.*

[5] *Id.*

[6] PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2005 1 (2006), *available at*

jails brings the number of people behind bars to 2,186,230[7] for a national incarceration rate of 738 per 100,000 people,[8] the highest recorded rate in the world.[9]

Go Directly to Jail is a fairly slim book, a collection of six lightly-edited and barely-updated position papers previously published by the Washington, D.C.-based Cato Institute. Despite the overwhelming numerical support for their claim that it is far too easy to "haul" Americans "off to jail," the introduction and three of the first four chapters fail at their task. Presented on behalf of several small, unrepresentative portions of the incarcerated population, the case made for reform relies upon an analysis that is factually and legally weak. In pursuit of a claim of near-innocence for the alleged victims of "overcriminalization," the authors of these chapters sidestep the central issue in sentencing, which is simply what amount of punishment a society should impose on wrongdoers.

The book's final two chapters take on a more robust, comprehensive approach to reform. The contrast between them and the introduction and Chapters 2, 3, and 4 provides a valuable lesson about effective advocacy for sentencing reform. The sixth and last chapter provides a clarion call and specific recommendations for federal sentencing reform, which also has relevance to state court sentencing. Sadly, the presence of this strong chapter teaches a painful lesson about the power of America's attachment to punishment. With the benefit of hindsight, we can see that a once-in-a-lifetime upheaval in sentencing law by the United States Supreme Court has had little tangible impact on sentencing in the federal courts. In the end, then, *Go Directly to Jail* provides its readers with dual lessons about the magnitude of the task of achieving true sentencing reform.

I. "OVERCRIMINALIZATION" OVERSIMPLIFIED: HOW ARGUMENTS FOR SENTENCING REFORM FAVORING FAVORED OFFENDER CLASSES FAIL

The Cato Institute was founded by Charles Koch and funded by him and his brother David Koch. The Koch brothers are from an oil, industrial, and timber-rich Kansas family with deep conservative and libertarian

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http://www.ojp.usdoj.gov/bjs/abstract/pjim05.htm.

[7] *Id.* at 2.

[8] *Id.* at 2 tbl.1.

[9] The highest reported rates per 100,000 for other countries are: Russia, 564; St. Kitts and Nevis, 559; Cuba, 487; and South Africa, 344. Rates for developed countries include Israel, 204; England and Wales, 145; Canada, 116; Germany, 97; France, 88; and Japan, 60. The Sentencing Project, New Incarceration Figures: Growth in Population Continues (2005), *available at* http://www.sentencingproject.org/pdfs/1044.pdf.

leanings.[10] The Cato Institute opposes government planning and regulation on all fronts,[11] including that which is imposed through criminal law. Unlike some ultra-conservative advocacy groups, it actively opposes unbridled police and prosecutorial conduct in favor of Fourth Amendment values and against federal regulation of what the Cato Institute considers individual and state prerogatives.[12] For example, the Cato Institute joined with traditional criminal defense reform groups to oppose the ultimately successful federal effort to prosecute (i.e., "criminalize") the sale of marijuana for medical purposes under California law.[13] *Go Directly to Jail* argues in favor of business people whose entrepreneurship put them at odds with environmental, medical, election, and other regulatory laws. Some of these people went to prison, and it is this constituency for whom Cato goes

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[10] Bill Berkowitz, *Patron Saints of Right Wing Think Tank Acquire Georgia Pacific Corporation*, MEDIA TRANSPARENCY, Dec. 6, 2005, http://www.mediatransparency.org/story.php?storyID=98.

[11] The Cato Institute identifies itself, inter alia, as an organization that

> subscribe[s] to the principles of the American Revolution—individual liberty, limited government, the free market, and the rule of law . . . . Supporters of human rights and free markets [whose work] combines an appreciation for entrepreneurship, the market process, and lower taxes with strict respect for civil liberties and skepticism about the benefits of both the welfare state and foreign military adventurism.

Cato Institute, About Cato, http://www.cato.org/about/about.html (last visited Oct. 15, 2006). Cato subscribes to the concept that "[t]he simpler the society, the less damage government planning does. Planning is cumbersome in an agricultural society, costly in an industrial economy, and impossible in the information age. Today collectivism and planning are outmoded and backward, a drag on social progress." *Id.*

[12] The Cato Institute actively intervenes as amicus curiae in many state and federal cases. It filed a brief as amicus curiae in *Rumsfeld v. Padilla*, 540 U.S. 1159 (2004) (mem.), opposing the federal government's post-September 11th "sweeping constitutional claims—that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation . . . and, in effect, deny the prisoner access to Article III judges to seek the habeas 'discharge' remedy." Brief for the Cato Inst. as Amicus Curiae Supporting Respondents at 2-3, *Padilla*, 540 U.S. 1159 (No. 03-1027) [hereinafter Brief for the Cato Inst., *Padilla*], *available at* http://www.cato.org/pubs/legalbriefs/rumsfeldvpadilla.pdf. In cases such as *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the Cato Institute filed an amicus brief in support of a citizen's Fourth and Fifth Amendment rights, Brief for the Cato Inst. as Amicus Curiae Supporting Petitioner, *Hiibel*, 542 U.S. 177 (No. 03-5554), *available at* http://www.epic.org/privacy/hiibel/cato_amicus.pdf, putting it on the same side as civil rights organizations such as the ACLU, Brief for the Am. Civil Liberties Union as Amicus Curiae Supporting Petitioner, *Hiibel*, 542 U.S. 177 (No. 03-5554), *available at* http://www.aclu.org/FilesPDFs/hiibel.pdf, and in opposition to organizations such as the ultra-conservative Criminal Justice Legal Foundation, Brief for the Criminal Justice Legal Foundation as Amicus Curiae Supporting Respondents, *Hiibel*, 542 U.S. 177 (No. 03-5554), *available at* http://www.epic.org/privacy/hiibel/cjlf_amicus.pdf.

[13] Ashcroft v. Raich, 542 U.S. 936 (2004) (mem.); *see also* Brief for the Cato Inst., *Padilla*, *supra* note 12.

to bat.

The Cato Institute's ideological orientation adversely affects the factual and legal analysis in the introduction[14] and Chapters 2,[15] 3,[16] and 4.[17]

First, *Go Directly to Jail* bolsters its case against "overcriminalization" on claims of the good character of people prosecuted and threatened with prison. In Chapters 2, 3, and 4, *Go Directly to Jail* details the complaints of, respectively, newly criminalized managerial, professional, and entrepreneurial classes;[18] businesses that are prosecuted for alleged environmental crimes;[19] and medical professionals and businesses that deal with government-funded medical benefit programs.[20]

In these chapters, the authors cite as examples: prosecutions brought against defendants such as a "Joseph Wilson" who filled in wetlands with clean dirt that was unloaded onto dry land;[21] a prosecution brought against business people who spoke out against intrusive governmental activities or too-forcefully protested their innocence of the environmental crimes with which they were charged;[22] and prosecutions such as those brought against Michael Weitzenhoff and Thomas Mariani for di minimus violations of sewage discharge requirements which were committed under exigent circumstances.[23] In support of the proposition that "overcriminalization" leaves "ordinary business people . . . at risk of prosecution for everyday business activities," Gene Healy recites the plight of one Edward Hanousek, Jr., who was found responsible for a pipeline rupture which led to an oil spill into an Alaskan waterway even though he was not at the site of the accident.[24] Timothy Lynch makes a case for Paul J. Buckley, a demolition crew's supervisor who was sentenced after being convicted of discharging

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[14] Gene Healy, *Introduction*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at vii, ix.

[15] James V. DeLong, *The New "Criminal" Classes: Legal Sanctions and Business Managers*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 9.

[16] Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 45.

[17] Grace-Marie Turner, *HIPAA and the Criminalization of American Medicine*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 73.

[18] DeLong, *supra* note 15, at 11.

[19] Lynch, *supra* note 16, at 47 ("Many businesses are operating in what is essentially a regulatory police state.").

[20] Turner, *supra* note 17, at 84.

[21] DeLong, *supra* note 15, at 12.

[22] *Id.* at 26.

[23] *Id.* at 20, 21, 26, 30-31.

[24] Healy, *supra* note 14, at ix; *see also* Lynch, *supra* note 16, at 63. Hanousek's situation was also sympathetically noted by Justice Clarence Thomas in a dissent from denial of certiorari. Hanousek v. United States, 528 U.S. 1102, 1102-03 (2000) (Thomas, J., dissenting).

asbestos into the environment without any proof of intent.[25] Finally, all of Chapter 4 bemoans the plight of physicians, many of whom, it is argued, will almost inevitably be subjected to criminal liability due to the complexity and fog of federal regulations governing Medicare.[26]

It will be perfectly clear to anyone familiar with the typical American courtroom, jail, or prison that the economic class of offenders on whose behalf the authors of the introduction and Chapters 2, 3, and 4 argue for reform are not representative of the average American prisoner—overall an underserved, predominantly minority, disadvantaged population. Many readers sensitive to the profile of the prison population are likely to be unsympathetic to the plight of a more capable and better resourced group of people and corporations. But it would be a mistake to dismiss the arguments made on behalf of a more privileged group of offenders solely on class grounds. If the claims made on behalf of this class of offenders are correct, then there should be redress, no matter how small or elite the class. One should not fault the Cato Institute for not including within their chosen class of offenders others who are far more numerous, such as minor drug offenders or first time non-violent criminals, on whose behalf sentencing reformers traditionally argue for relief on the basis of relative culpability or minimal criminal intent. Instead, it might be instructive for all reform advocates to consider whether calls for sentencing reform based on claims that some group is less culpable as a class than other offenders are as susceptible to the flaws which visibly attach to this approach in *Go Directly to Jail*.

For a significant number of offenders whose cases are highlighted in *Go Directly to Jail*, the facts revealed in court pleadings and opinions undermine the book's claims of their good character and innocent behavior:

- The brief for Edward Hanousek's lack of involvement in or even knowledge of a crime lies in the fact that he was off-duty and away from the scene when a backhoe operator working under him accidentally ruptured an Alaskan oil pipeline while maneuvering the backhoe to move rocks that had fallen onto a section of rail line.[27] From an appellate court opinion, however, we learn additional information that is not given to the reader in *Go Directly to Jail*.

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[25] Lynch, *supra* note 16, at 57.

[26] Turner, *supra* note 17, at 79-80. In Chapter 4, Grace-Marie Turner, distressed over the prospect of "honest billing errors" leading to a prison sentence for medical professionals, focuses on the need for "[r]eal change in the American health care system" which will come, she maintains, "only when the power to make health care decisions is taken away from politicians, bureaucrats, lawyers, consultants, and accountants, and placed into the hands of those whose lives and health depend on access to quality medical treatment." *Id.* at 90.

[27] Healy, *supra* note 14, at ix.

According to the government's evidence at trial, Hanousek was obligated as an independent contractor to attend to "every detail of the safe and efficient maintenance and construction of track . . . and . . . special projects" for his Alaskan employer.[28] One special project involved quarrying rock with heavy equipment and machinery along a one thousand foot section of rail line that ran parallel to a high-pressure oil pipeline.[29] When the company began work in April 1994, it covered approximately three hundred feet of the pipeline in the area in which it was then working with railroad ties, sand, and ballast to protect the pipe from damage by the equipment.[30] Hanousek took over responsibility for the project in May.[31] Thereafter, the protective covering was not extended along with the work area in the section where the rupture occurred.[32] No company policy prohibited a worker from driving a backhoe along the unprotected portion of the pipeline.[33]

So although Hanousek was away from the site when the accident occurred, it was he who failed to have the pipeline protected in a customary fashion or to instruct his employees to keep the backhoe away from unprotected pipe. Hanousek may well have been a decent person, but he was also someone whose failure to take the precautions followed by his predecessors on the job led to an environmental accident.

- In Chapter 2, James V. DeLong reinforces his contention that the "new criminalization" makes felons out of people who have no idea that their acts are criminal with the case of "Joseph Wilson."[34] Wilson began a large development in Charles County, Maryland, in the 1970s.[35] According to DeLong, Wilson had his plans reviewed and approved by four federal agencies, including the U.S. Army Corps of Engineers.[36] In 1990, however, the U.S. Army Corps of Engineers notified Wilson that "he had violated the Clean Water Act by adding fill dirt to a five-acre site that lies in the middle of a local business

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[28] United States v. Hanousek, 176 F. 3d 1116, 1119 (9th Cir. 1999).

[29] *Id.*

[30] *Id.* at 1119, 1124-25.

[31] *Id.* at 1125.

[32] *Id.*

[33] *Id.*

[34] DeLong, *supra* note 15, at 22.

[35] *Id.*

[36] *Id.*

district, surrounded by highways and railroad tracks."[37] Wilson removed the dirt, and then sued the government for taking his property.[38] "Only then did the government start a criminal investigation" which culminated in a trial, conviction, and a twenty-one month sentence.[39]

The Fourth Circuit describes a different set of facts, starting with the first name of the defendant being "James."[40] According to the Court, the four parcels of land which Wilson refused to treat as wetlands were a portion of what would be, at completion, a 9,100 acre planned community with some 80,000 residents.[41] The Department of Housing and Urban Development and Wilson's co-defendant, a company called Interstate General (of which Wilson was CEO and Chariman of the Board of Directors), had submitted an environmental impact statement for the development, which was approved.[42] That statement "did not reflect any specific development plans for the four parcels involved" in the criminal case.[43] Wilson was hardly an unwitting actor. The four parcels involved in the criminal prosecution had been previously identified to Wilson as wetlands by various agencies, were included on the National Wetlands Inventory Map, and were described as wetlands in bids for work submitted to the defendants.[44] The defendants had unsuccessfully tried to dry the parcels out with drainage and by adding fill.[45] The defendants declined to follow their own consultant and the county's zoning board's recommendations that they obtain permits from the Army Corps of Engineers before proceeding.[46] According to trial evidence, when the defendants were ordered to cease construction on one of the four parcels and to remove fill that had been added, "they continued to develop the other parcels without notifying the Corps or making an effort to ascertain whether a permit was necessary."[47]

Go Directly to Jail highlights Wilson's *sentence* to prison. It does not mention that Wilson probably never served a day behind bars.

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[37] *Id.* at 22-23.
[38] *Id.* at 23.
[39] *Id.*
[40] United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).
[41] *Id.* at 254.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 255.
[45] *Id.*
[46] *Id.*
[47] *Id.*

While not kind to Wilson in its factual statement of the case, the appellate court reversed and remanded Wilson's conviction on the grounds that the regulation which Wilson violated was "unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid."[48]

- Chapter 2 also describes Weitzenhoff and Mariani as two Hawaiian sewage plant managers sentenced to prison for ordering the release of 436,000 pounds of solid matter sewage when, it is asserted, the permit under which the plant operated allowed "only 409,000 pounds—a difference of roughly 6 percent."[49] Again, the reported opinion[50] casts a less innocent light on the defendants.

  Renovations were supposed to allow the plant to internally dispose of excess solid waste, but soon after completion the plant failed to do so.[51] The defendants abandoned their previous practice of transferring the excess solid waste to another site for processing.[52] Instead, they ordered employees to open valves that allowed waste to flow directly into the sea at night and bypassed record-keeping.[53] When officials investigated beach-users' complaints about the fouled waters, the defendants denied the possibility that their plant was the cause and cited records they knew to be false.[54] According to one of the plant's employees, Weitzenhoff instructed him not to tell authorities about the illegal discharges.[55] Mariani then perjured himself in an effort to conceal his knowledge of the intentional release of sewage.[56]

It is easy to understand why the authors and editor of *Go Directly to Jail* bolster their case against "overcriminalization" by emphasizing facts that support a picture of essentially good, even "innocent" people becoming convicted felons and prison inmates for simple mistakes made during a basically honest effort to advance business interests. But in the practice of

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[48] *Id.* at 254. This case appears to be the same as one reported from a secondary source by DeLong, albeit without name, and also without mention that the conviction was overturned on appeal. According to DeLong, the case was "widely recounted." *See, e.g.*, DeLong, *supra* note 15, at 12 & n.10; Max Boot, *The Wetlands Gestapo*, WALL ST. J., Mar. 3, 1997, at A18.

[49] DeLong, *supra* note 15, at 30-31.

[50] United States v. Weitzenhoff, 35 F.3d 1275, 1281-83 (9th Cir. 1994).

[51] *Id.* at 1282.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1292.

criminal law, facts seldom unequivocally support claims of innocence for offenders sentenced to prison. The problem for those committed to sentencing reform, in a nation whose prisons are filled *mostly* with people who are culpable of some crime, is that the strategy of arguing for lighter sentences for the "truly less culpable" and "nearly-innocent" or "minor" offenders avoids the central question: what amount of punishment is appropriate for people whose criminal conduct has harmed others? The issue that really needs discussion is whether or not a prison sentence is the best, or even a necessary outcome in the face of an intentional or negligent commission of a crime that causes harm. Given that Hanousek committed grave or negligent oversights, was an expensive federal criminal prosecution and a prison sentence the best outcome intelligent people could come up with? Given that Wilson intentionally and repeatedly violated wetlands restrictions, would a jail sentence have been any more productive than a fine, confiscation of property, or some other outcome that would equally deter land developers while, perhaps, restoring the damaged environment? These are questions which the Cato Institute might have elected not to explore, as the answers implicate further governmental regulation and monitoring of business activities. Others may avoid these questions because they are tough to answer. Either way, we miss an important discussion.

The Cato Institute's orientation may have also influenced *Go Directly to Jail*'s analysis of the law of criminal intent as further support for its theory of "overcriminalization."

According to Healy's introduction, "overcriminalization" is the result of the erosion of "common law doctrines of mens rea ('guilty mind') and actus reus ('guilty act')" to the point that "it's possible to send a person to prison without showing criminal intent or even a culpable act."[57] This theme is repeated again in the chapters that follow.[58] The "lack of intent" analysis applies to "business owners and corporate executives . . . convicted under the 'responsible corporate officer doctrine'"; violators of the McCain-Feingold campaign finance law and the Sarbanes-Oxley Act of 2002; pain-management doctors for prescription abuse; and "ordinary business people" engaged in "everyday business activities."[59]

Several of the authors in *Go Directly to Jail* suggest that legislatures and courts have recently permitted a relaxation in the requirement of proof of mens rea as a necessary predicate to a criminal conviction for a

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[57] Healy, *supra* note 14, at vii-viii.

[58] *See, e.g.*, Lynch, *supra* note 16, at 56.

[59] Healy, *supra* note 14, at viii-ix.

regulatory offense.[60] However, they do not mention long-standing policies that allow legislatures to make violations of regulatory provisions criminal offenses for which a person can be convicted without proof of specific intent to do harm when "the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in the cases of mala in se."[61] Examples of these decisions date to the early twentieth century and include laws that place the burden on a taxpayer to ascertain the facts surrounding her tax liability, and laws that impose criminal liability for "mere negligence" by a seller who lacks specific knowledge of the qualities of the material actually sold when he knows that the product may be dangerous to others.[62] Courts held many years ago that criminal penalties in lieu of administrative sanctions are justified by the public's interest in deterring other commercial enterprises from engaging in similarly negligent conduct.[63] By ignoring pertinent legal history, the authors of the introduction and Chapters 2, 3, and 4 of *Go Directly to Jail* sidestep discussion of public policy underlying laws that criminalize and punish negligent conduct that endangers public health.

These authors also wrote their summaries of court decisions to make it appear as if courts have fully jettisoned the law of intent.

- In presenting the *Buckley* case, the facts of which involved the release of asbestos into the environment in the course of a demolition project, the author contends that the decision "dispense[s] with *mens rea*" in applying the Clean Air Act and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[64] According to the author, "[t]he trial court told the jury that the government did not have 'to prove a wrongful intent or awareness of wrongdoing'" and further instructed the jury that the defendant's "good faith was deemed 'immaterial.'"[65] However, this is an inaccurate reading of the court's opinion. The instruction issues considered by the court focused precisely on the meaning of the words "knowingly emitted" and "known release."[66] Buckley contended that the trial court's jury instruction excused the government from proving that he was aware of wrongdoing, meaning the illegality of discharging asbestos into the

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[60] *See* Healy, *supra* note 14, at vii-viii; Lynch, *supra* note 16, at 56-59; Turner, *supra* note 17, at 79 (complaining of the uncertainty doctors face due to the inexactitude of federal regulations).

[61] United States v. Balint, 258 U.S. 250, 252 (1922).

[62] *Id.* at 252-53.

[63] *Id.*

[64] Lynch, *supra* note 16, at 57.

[65] *Id.*

[66] United States v. Buckley, 934 F.2d 84, 89 (6th Cir. 1991).

air.[67] The appellate court held that the government did not have to prove that Buckley knew the provision of the law or regulation which prohibited the release of asbestos.[68] It did require the government to prove that Buckley knew asbestos was present and likely to be disbursed in the air.[69] The appellate court's reasoning was that the "very nature of asbestos and other hazardous substances" gives a person responsible for handling such materials "constitutionally adequate notice" of possible criminal liability.[70] It found that the government met that burden and affirmed Buckley's conviction.[71]

Again, the introduction and Chapters 2, 3, and 4 of *Go Directly to Jail* avoid a potentially valuable discussion about the degree of knowledge or intent which must be proven to sustain a criminal prosecution of a defendant who negligently, or inconsistent with business or social conventions, violates government health and safety regulations. In *Buckley*, the public policy in play is the desire to discourage a company that deals with substances known to be hazardous from shielding itself or its employees from criminal liability by employing ignorant and uninformed supervisors in jobs where knowledge and skill are required for public protection. The arguments on behalf of Edward Hanousek, who for all we know was at home in bed when the employee he supervised drove the backhoe into the oil pipe, is never matched against the countervailing public interest in subjecting companies that damage the environment to criminal liability if they do not have responsible employees on the scene or otherwise take action to forestall an underling's blunder.

Go Directly to Jail would have been a better book if the authors of the introduction and Chapters 2, 3, and 4 had chosen to explore issues surrounding criminal responsibility and punishment. The law is far from settled on questions such as criminal liability for the acts of another, as in *Hanousek*, or the constitutionality or wisdom of imposing severe criminal penalties on people whose questionable acts are either just outside, or barely inside, the parameters of regulatory guidelines, as in *Weitzenhoff*. In fact, these same questions were heatedly argued by the majority and dissenting judges in the very cases cited in *Go Directly to Jail*.[72]

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[67] *Id.* at 87.

[68] *Id.* at 88.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 89.

[72] *See, e.g.*, United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994). Judges dissenting from denial of motion for a hearing en banc wrote:

> Dilution of the traditional requirement of a criminal state of mind, and application of the criminal

In their avoidance of knotty questions about fixing punishment for offenders who did not act in complete innocence or with the best intentions, factually or under the law, the authors of the introduction and Chapters 2, 3, and 4 are not alone. Serious discussions by policymakers about the quantum of punishment that should be meted out to offenders have seldom occurred in the thirty-plus years of escalating incarceration.[73] The nation has seldom been treated to a serious, non-politicized, public debate about when it is that illegal actions justify or mandate *criminal* prosecution and *lengthy sentences* to prison. What objective study can even attempt to determine the appropriate length of sentence for a water treatment plant operator who, in the dark of night, dumps sewage into ocean water and orders subordinates to lie to investigators to conceal his actions? No sociological or scientific research defines the most effective punishment for a competitive land developer who overtly ignores inconvenient environmental regulation. In a political environment that favors punishment and prison, how may politicians ask whether the desired results might be more effectively achieved through greater regulatory oversight, inspections, audits, fines, or civil remedies; through private litigation brought to obtain compensation; or even through imposing punitive damages?

These kinds of questions would open the door to reconsideration of sentencing policies that would apply to prisoners whose profiles are less sterling than those somewhat mythically described in *Go Directly to Jail*.[74]

> law to innocent conduct, reduces the moral authority of our system of criminal law. If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary.

Id. at 1293 (Kleinfeld, J., dissenting). These arguments are strikingly similar to those presented by the authors in *Go Directly to Jail*:

> Most of all, overcriminalization weakens the moral force of the criminal law. . . . When the criminal sanction is used for conduct that is widely viewed as harmless or undeserving of the severest condemnation, the moral force of the penal code is diminished, possibly to the point of near irrelevance among some individuals and groups.

DeLong, *supra* note 15, at 7; *see also* Healy, *supra* note 14, at xii.

[73] I know of no research or serious study that presents an objective, behavioral, or scientific finding to the effect that a particular sentence length provides optimal punishment or best serves the goals of sentencing. State statutes and guidelines seem to derive sentence lengths from previous practices, electing to increase, and almost never decrease, sentences on the basis of a gut feeling that punishment needs be increased, or because of an increase in a particular crime—the "crime of the month" as Eric Luna notes in his Chapter One. Erik Luna, *Overextending the Criminal Law*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 1, 5, 7.

[74] There are credible challenges to sentences imposed on serious offenders convicted of violent or heinous acts. *See* MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT (2004), *available at* http://www.sentencingproject.org/pdfs/lifers.pdf.

These questions are equally relevant for the far more numerous drug possession and drug sales offenders. They could be asked on behalf of repeat property offenders facing "three strikes" lifetime sentences. They are certainly relevant to deciding what sentence might be imposed following a conviction for violent offenses and homicides. Regrettably, the introduction and Chapters 2, 3, and 4 of *Go Directly to Jail*, like most of the nation's public dialogue on crime and punishment, avoid the important questions about the value of punishment.

II. A PRINCIPLED, ROBUST CALL FOR SENTENCING REFORM

Go Directly to Jail takes a very different turn in its last two chapters. Both eschew reliance upon claims of near-innocence for certain classes of criminal defendants and instead build their case for sentencing reform on broad principles applicable to all offenders. In Chapter 6, Erik Luna writes, "[t]he very integrity" of criminal procedure "is measured not by the rights accorded sympathetic defendants, but by the treatment provided the worse offenders in the criminal justice system."[75] Upon this rock he builds a devastatingly accurate case against sentencing under the federal guidelines. Healy, in Chapter 5, dissects Project Safe Neighborhoods, which brings federal law enforcement and sentencing on the heads of offenders in whose jurisdiction the federal program is implemented, with little concern for fidelity to constitutional principles or effective results.[76]

Worth the price of admission, particularly for anyone not absolutely steeped in the voluminous critical commentary about federal sentencing guidelines, Luna's Chapter 6 starts with the bottom line: the federal prison system has quadrupled in just a decade and a half, with more than four out of ten inmates sentenced for drug offenses.[77] The guidelines virtually mandate specific sentence lengths to the extent that, Luna argues, they are the equivalent to mandatory minimum sentences.[78] Luna views both as attempts "to purge sentencing discretion in federal trial courts."[79] Luna provides an account of the congressional compromise, which led by a narrow vote to the replacement of indeterminate federal sentencing and parole with federal sentencing guidelines.[80] Luna does not accept the

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[75] Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 119, 141.

[76] Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, *in* GO DIRECTLY TO JAIL, *supra* note 1, at 93.

[77] Luna, *supra* note 75, at 119-20.

[78] *Id.* at 120.

[79] *Id.*

[80] *Id.* at 123.

perception that vast disparities in pre-guidelines sentencing drove liberals to support the new system, nor does he accept the proposition that sentencing systems which give judges discretion will lead to unjust disparity at sentencing.[81] According to Luna, the federal sentencing guidelines have proven that the reform ideal of "mechanically applying the law to a set of facts and thereby generating a proper sentence without the vagaries of trial-judge decision making" was "more fantasy than reality."[82] As Luna has it, the United States Sentencing Commission, established as "an independent commission in the judicial branch" that was to "capture pertinent aspects of the offender and the offense" and craft them all into a structure which would guide judges to sentence within narrow confines, has achieved neither independence nor a worthy sentencing scheme.[83]

Luna argues that the federal guidelines system was unconstitutional on three grounds:

- First, following Justice Scalia's dissent in *Mistretta v. United States*,[84] the federal legislature improperly delegated its powers to set sentence length to the Commission.[85]
- Second, the Commission lacks "accountability," in part because it is not subject to the restraints placed on most administrative agencies. Such restraints include a standard of judicial review that requires agency decisions be guided by something more than an "arbitrary and capricious standard."[86] Certainly judicial review and a higher standard are needed when, as Luna notes, the Commission has increased sentences with no more rationalization than that existing sentence lengths "are inadequate."[87]
- Third, Luna faults the federal guidelines for the constitutional flaw acknowledged by the United States Supreme Court decisions in *Blakely v. Washington*[88] and then in *United States v. Booker* and *United States v. Fanfan*:[89] under the guidelines a federal judge was *required* to increase sentences based on facts that were provided to the judge without protection of the rules of evidence and that might meet a

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[81] *Id.* at 121-23, 144-46.

[82] *Id.* at 122.

[83] *Id.* at 123.

[84] Mistretta v. United States, 488 U.S. 361, 412 (1989) (Scalia, J., dissenting).

[85] Luna, *supra* note 75, at 124.

[86] *Id.* at 125.

[87] *Id.*

[88] 542 U.S. 296, 308-10 (2004).

[89] United States v. Booker, 543 U.S. 220 (2005). The *Booker* decision consolidates *United States v. Booker* and *United States v. Fanfan,* appealed from the Seventh and First Circuits, respectively. *Id.* Hereinafter the opinion is cited only as "*Booker.*"

burden of proof "no higher than in an ordinary civil case."[90]

Luna details other flaws. The guidelines strip nearly all discretion from federal judges.[91] Their penalty structure is unduly influenced by the Department of Justice.[92] Sentencing in any particular case is determined by a "distant" Congress or Commission that never confronts or even sees the individual being sentenced.[93] Under federal guidelines procedures, federal prosecutors have an inordinate amount of control and authority.[94] Prosecutors can lever a plea bargain by threat of a very long sentence after trial with the promise of asking the judge to impose a sentence less than the minimum guideline length on the basis of their assertions that the defendant cooperated with law enforcement.[95]

Healy's Chapter 5 focuses on violations of the principles of federalism that pervade President George W. Bush's Project Safe Neighborhoods, a program that allows states to cede the enforcement of weapons violations to federal prosecutors and federal courts.[96] His analysis is historical and based on an interpretation of constitutional law. He advances the Cato Institute's theory of federalism, but his arguments hardly convey a sense that he is driven by the interests of a class of offenders, or even by gun owners, and certainly not by the National Rifle Association, which apparently supports the President's program.[97]

Both Luna and Healy propose sentencing reforms that would have a downward impact on sentence length. Healy attacks prosecutorial forum shopping, "assembly-line justice,"[98] and a "body count" incentive system that drives federal prosecutors to use minor offenses to obtain prison sentences, with very little benefit in terms of crime control.[99] Luna criticizes a guidelines system that prohibits judges from considering mitigating factors such as age, military service, or mental or emotional conditions.[100] Luna calls for remedies that go well beyond the minor

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[90] Luna, *supra* note 75, at 130 (citing United States v. Rodriguez, 73 F.3d 161, 162 (7th Cir. 1996) (Posner, J., dissenting)) (referencing *id.*; Blakely v. Washington, 524 U.S. 296 (2004)).

[91] *Id.* at 126.

[92] *Id.*

[93] *Id.* at 127.

[94] *Id.* at 127-28.

[95] *Id.*

[96] Healy, *supra* note 76, at 94-95.

[97] *Id.* at 112.

[98] *Id.* at 105.

[99] *Id.* at 105-06. Healy credits George Washington University Law Professor Jonathan Turley with the "body count" analogy. *Id.*

[100] *Id.* at 135.

procedural corrections sought by more timid reformers, such as disbanding the United States Sentencing Commission,[101] wholesale reexamination of federal sentencing "from a holistic perspective,"[102] and authority and confidence in trial judges to "mete out punishment that fits both the offense and the offender, mindful of the deeply held notion that people must be treated as unique beings worthy of individualized treatment and not as undifferentiated objects on the conveyor belt of sentencing."[103]

Here we have a vigorous call for serious sentencing reform! Unfortunately, we also have a lesson in the power of the forces that resist sentencing reform in America.

III. WITNESSING AMERICA'S ENTRENCHED ATTACHMENT TO PUNISHMENT

In an accident of timing, Luna's Chapter 6 was written before the United States Supreme Court overturned the mandatory nature of federal sentencing guidelines. Obviously not anticipating the eventual outcome in *Booker*, Luna concluded his position paper with an ambitious set of recommendations that were, at the time, unlikely to be adopted or even taken seriously. He called for:

- a thorough reexamination of federal sentencing "from a holistic perspective";[104]
- development of a federal sentencing scheme that allows judges to exercise informed discretion;[105]
- appellate review designed to produce a common law of sentencing,[106] something long urged by Professor Daniel Freed of Yale University Law School among others;[107] and
- an end to behind the scenes charge and "fact" bargaining.[108]

Seeing little likelihood for reform by the United States Sentencing Commission, Luna proposed that "brave members of Congress" act to correct an unjust system.[109]

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[101] *Id.* at 151.

[102] *Id.* at 145.

[103] *Id.* at 151.

[104] *Id.* at 145.

[105] *Id.* at 146-47.

[106] *Id.* at 147.

[107] *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1750 (1992).

[108] Healy, *supra* note 76, at 148.

[109] *Id.* at 150. It is possible Luna's proposal was made tongue-in-cheek. To many observers, Congress seemed far less likely to engage in sentencing reform than the United States Sentencing Commission. *See infra* note 125.

The United States Supreme Court's unanticipated dual decision in *Booker* put several of Luna's hitherto unlikely recommendations into play. In an opinion written by Justice Stevens, the Court struck down the federal sentencing guidelines.[110] But in a second opinion, Justice Breyer, one of the architects of federal guidelines and a dissenter to Justice Steven's opinion, restored constitutionality by rendering the guidelines "advisory," not mandatory as they had become.[111] After *Booker*, federal judges were free to exercise some degree of discretion at sentencing, much like Luna had wistfully recommended. In addition, Justice Breyer specifically invited Congress to review anew federal sentencing policy.[112]

Seldom has the door to reform appeared to open so far and so dramatically in the direction urged by a critic of the system than it did for Luna with the *Booker* decision. What happened afterwards, though, shows how hard it will be to achieve true and meaningful sentencing reform in America.

Minutes after the Court's decision hit the internet, expectations for change in federal sentencing ramped up. *Booker* was almost universally described as something akin to "an earthquake" in American law. Fifteen years of sentencing under a system highly unpopular with almost everyone, save United States Attorneys, congressional sentencing hawks, some members of the Sentencing Commission, and the most fanatical of "tough on crime" ideologues,[113] had been substantially undone. Change seemed inevitable.

But change did not come where it counts, in the length of prison sentences. In March 2006, more than one year after *Booker*, the Judicial Conference of the United States reported that the average federal prison sentence *increased* from fifty-seven months before *Booker* to fifty-eight months afterward, with increases of two months in the average sentence for drug trafficking, and three months for theft and fraud.[114]

Initially, some commentators,[115] district courts[116] and circuits read

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[110] United States v. Booker, 543 U.S. 220, 226 (2005) (Stevens, J., delivering the majority in part).

[111] *Id.* at 265 (Breyer, J., delivering the majority in part).

[112] *Id.* (Breyer, J., delivering the majority in part) ("Ours, of course, is not the last word: The ball now lies in Congress' court.").

[113] Luna, *supra* note 75, at 120.

[114] U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 71, 75 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter IMPACT OF *BOOKER*].

[115] JON WOOL, VERA INST. OF JUSTICE, BEYOND *BLAKELY*: IMPLICATIONS OF THE *BOOKER* DECISION FOR STATE SENTENCING SYSTEMS 2-3 (2005) ("[*Booker*] converts a strongly presumptive system into an advisory guidelines system. As a result, federal judges are now

Booker as if it opened the door to sentencing federal defendants outside the guidelines range. But in time, the majority of circuit courts held that under *Booker* the federal Guidelines were "presumptively reasonable,"[117] a standard that in practice discouraged sentences outside the guidelines range, leaving post-*Booker* sentencing, as one seasoned observer wrote, disappointingly "guidelines-centric."[118]

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required to consider the sentencing ranges provided by the guidelines, as well as other statutorily listed sentencing goals, but they are not require to follow them.").

[116] United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005). The court stated:

> District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as unusual.

Id. at 987. Furthermore, "[t]he directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines and, as one court suggested, 'only depart . . . in unusual cases for clearly identified and persuasive reasons.'" *Id.* at 985 (quoting United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005)).

[117] IMPACT OF *BOOKER*, *supra* note 114, at 26 exhibit 1, 27. Some circuit courts initially seemed to encourage a more open and unrestricted inquiry into all statutory sentencing factors by alerting district courts not to assume that a sentence "within a proper Guidelines range is per-se reasonable." United States v. Webb, 403 F.3d. 373, 385 n.9 (6th Cir. 2005); *see also* United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("[I]it will be rare for a reviewing court to say [that a sentence within the guidelines range] is 'unreasonable.'"). These differences appeared to have washed out, as in both the Fifth and Sixth Circuit the guidelines sentence is "presumptively reasonable"; the Ninth and Eleventh Circuit seem the only ones in which Circuit Courts affirm a District Court's "discretion to impose non-[g]uidelines sentences." United States v. Cantrell, 433 F.3d 1269, 1279 (9th Cir. 2006); *see also* United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005) ("A sentence within the guidelines range is not per se reasonable."); IMPACT OF *BOOKER*, *supra* note 114, at 26 exhibit 1. The question of whether a sentence within the guidelines range should be considered "presumptively reasonable" on appeal is still considered open. *See* Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/booker_and_fanfan_commentary/index.html (Oct. 13, 2006) (last visited Oct. 21, 2006).

[118] Douglas A. Berman, *Reasoning Through Reasonableness*, The Pocket Part—A Companion to the Yale Law Journal, http://thepocketpart.org/2006/07/berman.html. Professor Doug Berman writes:

> Disappointingly, circuit courts have not fully appreciated the importance of reasoned judgment at sentencing and have insisted upon a Guideline-centric approach to post-*Booker* sentencing. Every circuit has declared that district judges must still calculate Guideline sentencing ranges and must provide a detailed justification for deviating from the Guidelines. Many circuits have declared within-Guideline sentences "presumptively reasonable." And, in the eighteen months since *Booker*, district courts have imposed well over 50,000 within-Guideline sentences, but the circuit courts have declared only a precious few sentences "unreasonable" on appeal. Post-*Booker* circuit doctrines and practices encourage the sort of rote, mechanistic reliance on the Guidelines that Justice Stevens' merits opinion found constitutionally problematic.

Id.

Using the discretion granted them under *Booker,* some federal judges sentenced below the guidelines in a number of crack cocaine cases, long controversial because of a disparity between crack cocaine and powder cocaine sentence lengths.[119] But most of the judges who did so said they were following recommendations made by the Sentencing Commission before *Booker*, but refused by the United States Congress and the Clinton Administration.[120]

Ironically, after *Booker* many sentencing reform groups crossed their fingers and hoped that post-*Booker* sentencing lengths might remain nearly as severe as before *Booker.* Theirs was a strategy of lying low with hopes that the passage of time would show that federal sentencing judges were not imposing remarkably low sentences,[121] contrary to assertions of aggressive Department of Justice officials and ideologically-motivated congressional sentencing hawks who were making moves to legislatively overrule the *Booker* decision.[122] *Booker*, everyone knew, did not prohibit mandatory minimum sentences. Thus Congress had the option of attempting to rewrite the guidelines as if they were mandatory, somewhat problematic in light of *Booker*, or to create mandatory minimum sentences for every federal offense, which was far less problematic.

That strategy, plus the distractions of a floundering war in Iraq and Supreme Court resignations, has succeeded to date. Reformers celebrate, not a reduction in sentence, but the fact that *Booker's* "advisory" guidelines have not been replaced with something that is even more severe.[123]

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[119] RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf.

[120] *Id.*

[121] This observation is based on the author's recollection of discussions during strategy sessions among sentencing reform organizations, including The Sentencing Project, the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, and others, in the months following the *Booker* decision.

[122] Representative Howard Coble, a North Carolina Republican, opened hearings on legislation to "correct" *Booker* with claims that "[u]nfortunately, the data shows that once freed from the mandatory guideline system, judges have now returned to sentencing practices, and handed out unwarranted and unjustified downward departures for sex offenders, child pornographers, pedophiles, drug traffickers and career criminal offenders." *Judiciary Asks Congress to Tread Carefully with Sentencing*, THE THIRD BRANCH, Apr. 2006, at 1, *available at* http://www.uscourts.gov/ttb/04-06/tread_carefully/index.html.

For a running account of attempts to "fix" *Booker*, see Douglas A. Berman's blog, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/sensenbrenner_t.html (last visited Oct. 21, 2006).

[123] Booker *Revisited*, FAMMGRAM (Families Against Mandatory Minimums, Wash. D.C.), Spring 2006, at 1, http://www.famm.org/FAMMGRAMS/2005/FGspring06final[1].pdf.

Reformers still worry that the Department of Justice will ask Congress to take this step and make the guidelines mandatory.[124] They watch while Congress passes more individual mandatory sentences, thereby undercutting bit by bit the judicial discretion that, in theory, was restored in *Booker*.[125] Their worries are justified. The Department of Justice, hardly satisfied with the increase in average sentence length since *Booker*, notes instead "two very troubling trends: the first is a marked decrease in within-guidelines sentences, and the second is increased inter-circuit and inter-district sentencing disparity."[126] It is hard not to conclude that Department of Justice officials are motivated by little more than a reflexive desire to increase sentence length. After all, the first problem noted could be resolved by modifying the guidelines. The Department's crocodile tear plea to end sentencing disparity, somewhat belied by its persistent commitment to preserving the crack-powder disparity written into law, may be nothing more than an echo of the original, overblown justification for guidelines in the first place. It is worth repeating Luna, who quotes Professor Albert Alschuler's famous evaluation of federal guidelines: "Some things are worse than sentencing disparity, and we have found them."[127]

But it is also necessary to repeat that after the United States Supreme Court seemingly upended the entire federal sentencing guidelines system and opened the door to changes recommended by reformers such as Luna, the average length of sentence imposed by federal courts continues to increase.

IV. A STRATEGY FOR SENTENCING REFORM

Go Directly to Jail provides a telling measure of the magnitude and scope of the change required to achieve sentencing reform. It teaches that advocacy for reform anchored in a depiction of certain types of criminal defendants as people who are minimally involved in crime, who are just too nice for words, or who only made an unintentional mistake, is likely to fail to make the case for reductions in sentence length. But neither, it seems, are prospects much better for more principled, broad-based and far-reaching calls for change, even in those portions of the entire sentencing apparatus that, like the federal sentencing guidelines, are visibly flawed. Luna's sixth chapter in *Go Directly to Jail* makes the record clear: even if the United

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[124] *Id.*

[125] *Id.*

[126] Steve Lash, *House Panel Mulls New Sentencing Guide*, CHI. DAILY L. BULL., Mar. 16, 2006, at 1, 23 (quoting senior Justice Department official William W. Mercer).

[127] Luna, *supra* note 75, at 136 n.76 (quoting Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991)).

States Supreme Court imposes a considerable portion of a sentencing reform agenda, forces that have driven harsh sentencing to extremes unimagined thirty years ago will stymie change.

What is suggested, I submit, is the need for an alliance, a conscious effort to recognize common ground and common principles by disparate groups. The possibility of reform will be enhanced if interest groups that desire to reverse "overcriminalization" and get out from under the heavy hand of government extend their intellectual and financial resources to those who seek shorter sentences across the board, for some of the "worst offenders" as well those who are "nearly innocent." The effort to achieve real sentencing reform, say on a scale that would bring incarceration rates in the United States down to only two or three times the rate in other developed countries, would be greatly enhanced if groups with money and influence put their support behind advocacy for shorter and more humane sentences for all kinds of offenders. They can do this by joining in litigation, as the Cato Institute now frequently does; by assisting overtaxed public defenders who must challenge sentences for clients who are on the bottom, not the top, of the social order; by reaching out to political leaders; by taking on congressional sentencing hawks and Department of Justice minions who will fight every reasonable step to reduce sentence lengths; and generally by making the case for fewer criminal prosecutions and shorter sentences to their professional, business, and social colleagues.

There are many common issues that advocacy groups with different agendas can mutually pursue. Some of these are described by the authors of *Go Directly to Jail* and will be recognized by attorneys and advocates who speak for the vast majority of people in jail and prison. They include:

- the unbridled exercise of prosecutorial power and discretion, "used to coax pleas out of individuals with valid claims of mitigation or even innocence";[128]
- the high cost of capable representation when defending against criminal prosecution, well known to those concerned with the adequacy of defense services for legally indigent and middle class people;[129]

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[128] Luna, *supra* note 73, at 6.

[129] DeLong, *supra* note 15, at 12, 13; Turner, *supra* note 17, at 89 (arguing for reimbursement of costs when a defendant is found not guilty following an investigation). Failure of states to adequately fund indigent criminal defense, and the adverse impact on outcomes for poor people, were highlighted by many scholars and commentators on the fortieth Anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Gideon* Anniversary, National Association of Criminal Defense Lawyers, http://www.nacdl.org/gideon (last visited Oct. 21, 2006); *see, e.g.*, Bill Rankin, *Right to Lawyer Still Not a Given for Poor Defendants*, ATLANTA J.-CONST., Mar. 24, 2003, at 1B. For documentation of the

- an unwarranted judicial presumption of regularity and constitutionality in agency proceedings and judicial deference to agency expertise "on the gospel that all government officials operate in disinterested good faith";[130]
- the interests of law abiding citizens and businesses in Fourth Amendment protections;[131]
- a need for clarity in the definition of criminal, as opposed to non-criminal, conduct;[132]
- the restoration of the Fifth Amendment right not to have to incriminate one's self or one's corporation;[133]
- the removal of the financial incentive that drives law enforcement to rely upon the proceeds of asset forfeiture and criminal fines, penalties, and damages on offenders to meet expenses;[134] and
- the passage of criminal laws that carry heavy penalties despite the lack of objective information or research data on the extent of the crime, often "fueled by political polls, which were in turn fueled by misinformation and a crude political expediency, or the vague need to 'do something.'"[135]

The cause of sentencing reform will be better served when capable writers and advocates for business interests accept that, when it comes to sentencing, they have issues in common with "ordinary" criminal defendants. For example, consider the quotation in the last bulleted paragraph above, with which the writer in Chapter 4 explains the "overcriminalization" of insurance claims procedures. Perhaps she was unaware of how accurately she described the way nearly all sentence-lengthening legislation is passed.

The juxtaposition of Luna's recommendations for reform in Chapter 6 and the absence of meaningful change in federal sentence length after *Booker* is evidence that every available resource and political and public influence will be necessary to bring about true sentencing reform. The "criminal law" is too complex and the forces opposing reform are too great for any of us to expect that tinkering around with even the bigger pieces of the system will lead to substantial reform. The drive for reform must be of

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impact of inadequately funded criminal defense services, see AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE (2004).

[130] DeLong, *supra* note 15, at 39.

[131] Lynch, *supra* note 16, at 55.

[132] *Id.* at 51.

[133] *Id.* at 62.

[134] Turner, *supra* note 17, at 76.

[135] *Id.* at 78.

similar magnitude and scope to the forces that created, in three decades, a nation where it is "too easy" to go to jail. There has to be a broadly-felt public desire to change the way we sentence. As Luna wrote, "[i]n the end, the American people must decide" how convicted defendants should be sentenced.[136] The most likely way to reach the most people is with a new, vibrant, broad-based alliance firmly grounded in constitutional principles and shared goals, including first and foremost, reduction in the number of people who go to jail from every walk of life, and an examination and reduction in sentence length for people we might not like as well as those we do. Anything less will fail.

[136] Luna, *supra* note 75, at 151. Steve Bogira, a Chicago-area newspaper writer, spent a year watching major and minor cases, trials, and plea bargaining. He saw evidence of police misconduct, judicial compromise, and the clash of principle and expediency in a Cook County courtroom. He concludes as well that our criminal courts produce the results the American public wants: "[J]ustice miscarries every day, by doing precisely what we ask it to." STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 22 (2005).